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Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Wireless Telecommunications Bureau)	
Requests Comment on the Construction)	DA 99-974
Requirements for Commercial Wide-Area)	
800 MHz Licensees Pursuant to Fresno)	PR Docket No. 93-144
Mobile Radio, Inc. v. FCC)	

To: Chief, Wireless Telecommunications Bureau

REPLY COMMENTS OF NEXTEL COMMUNICATIONS, INC.

NEXTEL COMMUNICATIONS, INC.

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Date: July 29, 1999

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REPLY COMMENTS OF NEXTEL COMMUNICATIONS, INC.

I. INTRODUCTION

Pursuant to the May 21, 1999 Public Notice of the Federal Communications Commission ("Commission"),^{1/} Nextel Communications, Inc. ("Nextel") respectfully submits these Reply Comments supporting new construction requirements for 800 MHz wide-area Specialized Mobile Radio ("SMR") licensees to ensure parity with 800 MHz Economic Area ("EA") SMR licensees.^{2/}

On July 12, 1999, six commenters, including Nextel, submitted comments in response to the remand of the United States Court of Appeals for the D.C. Circuit ("Court") in *Fresno Mobile Radio*,

^{1/} Public Notice, "Wireless Telecommunications Bureau Seeks Comment on the Construction Requirements for Commercial Wide-Area 800 MHz Licensees Pursuant to *Fresno Mobile Radio, Inc. v. FCC*, DA 99-974, released May 21, 1999 ("Public Notice"). The Bureau subsequently extended the comment and reply comment dates. See DA 99-1168, released June 15, 1999.

^{2/} Throughout these comments, the term "wide-area licensee" or "wide-area SMR" refers to those licensees with extended implementation authority as granted by the Commission in its SMR extended implementation rejustification orders. See Order, 13 FCC Rcd 1533 (1997), *recon.*, 12 FCC Rcd 18,349 (1997) (hereinafter collectively "Rejustification Order"). "EA licensee" or "EA SMR licensee" refers to an SMR licensee that obtained a geographically-defined EA license in the Commission's Upper 200 channel auction.

Inc., et al., v. F.C.C. ("Fresno").^{3/} All but one of the Commenters conclude that the Commission must provide wide-area SMR licensees regulatory parity with EA licensees.^{4/} The majority of those conclude that parity would be achieved by applying the same one-third in three years and two-thirds in five years population coverage requirements applied to EA licensees.^{5/} Given that the Omnibus Budget Reconciliation of 1993 mandated regulatory parity among all similarly-situated Commercial Mobile Radio Service ("CMRS") providers, that wide-area and EA SMR licensees vigorously compete with one another and in the overall CMRS marketplace, and that the commenters herein overwhelmingly support the need for regulatory parity, the Commission should expeditiously apply to wide-area SMR licensees the same population coverage requirements applicable to EA SMR licensees.

^{3/} *Fresno Mobile Radio, Inc. v. F.C.C.*, 165 F.3d 965 (D.C. Cir. Feb. 5, 1999) ("*Fresno*").

^{4/} Only Mobile Relays, Inc. ("*Mobile Relays*") appears to disagree with the need for regulatory parity among all wide-area and EA licensees, although it never specifically rejects the notion in its Comments. See Comments of Mobile Relays, Inc.

^{5/} Comments of American Mobile Telecommunications Association ("*AMTA*") at para. 14; Chadmoore Wireless Group ("*Chadmoore*") at para. 1; William R. Miller dba Russ Miller Rental ("*Russ Miller Rental*") at para. 9; Southern Company ("*SoCo*") at p. 9.

II. DISCUSSION

A. **Regulatory Parity Requires the Commission to Impose on Wide-Area SMRs the Same Construction Requirements Imposed on EA SMR Licensees**

AMTA, SoCo, Nextel and Russ Miller Rental support applying to wide-area SMR licensees the same one-third in three years and two-thirds in five years population coverage requirements that apply to EA SMR licensees.^{6/} These construction requirements would not only ensure regulatory parity, thereby specifically responding to the concerns of the *Fresno* Court, but they also would allow licensees to commit investment in response to the demands of the marketplace; not regulatory fiat.^{7/} This, as SoCo recognized, would promote the Commission's goal of allowing economic forces, not regulation, to shape the CMRS marketplace.^{8/} As Nextel and AMTA pointed out, service on wide-area SMR systems is similar -- if not identical -- to the services provided by EA licensees.^{9/} Accordingly, wide-area licensees and EA licensees should be held to the same construction requirements.

All of these commenters, moreover, agree that the "coverage area" within which population coverage is measured should be, as AMTA described it, "the service area of the actual wide-area

^{6/} Comments AMTA at para. 15; Russ Miller Rental at para. 9; SoCo at p. 10; Nextel at p. 9.

^{7/} Comments of SoCo at p. 9.

^{8/} *Id.*

^{9/} Comments of AMTA at para. 14; Nextel at p. 6.

authorization . . ."10/ Moreover, as SoCo pointed out in its Comments, the Commission can measure compliance based on these coverage areas since it will have an "identifiable wide-area contour" within which total population can be quantified.11/ These commenters also agree that the timeline for measuring the new coverage requirements should begin no earlier than the effective date of the Commission's decision herein.12/ This is necessary, as SoCo and AMTA noted, due to the long-standing uncertainties and delays in SMR licensing.13/ Wide-area licensees should not be penalized for having exercised "reasonable caution when faced with regulatory uncertainty" during the previous five years.14/

Nextel, moreover, agrees with commenters that the fifty percent channel use requirement, applicable to Upper 200 channel EA licensees, need not be applied to applicable to wide-area licensees.15/ Because wide-area SMR licensees are licensed on a site-by-site, frequency-by-frequency basis, with varying numbers of channels assigned at each site, the requirement simply does not apply. Moreover, any attempt to enforce the fifty percent channel

10/ Comments of AMTA at para. 15; *see also* Comments of SoCo at p. 11 (coverage area should be "interference contours of the wide-area licensees' individually licensed sites. . .")

11/ Comments of SoCo at p. 11.

12/ *See* Comments of AMTA at para. 15; Russ Miller at para. 9; SoCo at p. 11.

13/ *Id.*

14/ Comments of AMTA at para. 15.

15/ *See* Comments of AMTA at para. 15; SoCo at p. 12.

use requirement in a non-EA environment would be cumbersome at best. For these reasons, the Commission should not impose this channel use requirement on wide-area SMR licensees.

B. Chadmoore Seeks Untimely Reconsideration of the Denial of its Extended Implementation Application

Chadmoore's Comments should be rejected as an untimely request for reconsideration of an issue that was not even addressed by the *Fresno* Court.^{16/} Had Chadmoore believed there was a legitimate "regulatory parity" argument regarding its inability to obtain an extended implementation license, it should have raised it in the *Fresno* proceeding -- just as SoCo raised the construction issue being addressed herein. Chadmoore paints itself as a "wide-area SMR" entitled to regulatory parity with EA licensees merely because it submitted an application for extended implementation authority. By denying that application, Chadmoore claims, the Commission did not provide Chadmoore regulatory parity with other CMRS licensees.

Chadmoore's assertions fail for several reasons: (a) *Fresno* remanded the issue of regulatory parity with regard to construction, not licensing; (b) *Fresno* queried whether wide-area SMR licensees and EA SMR licensees are entitled to regulatory parity, and Chadmoore is not a "wide-area licensee" since it was never granted extended implementation authority; and (c) to the extent Chadmoore's associated licensees were wide-area licensees, i.e., The Roberts Group, the Commission gave them the same

^{16/} Additionally, Chadmoore appealed the Commission's denial of its wide-area status, and the D.C. Circuit Court rejected it. *Chadmoore Communications, Inc. v. FCC*, 113 F3d 235 (D.C.Cir. 1997).

opportunity provided other wide-area SMR licensees to rejustify their extended implementation authority.

Chadmoore and its associated licensees were treated no differently than any other wide-area SMR licensee. The fact that they could not justify grant of extended implementation authorization or rejustification thereof is not evidence that they were subject to disparate treatment. Chadmoore and its associated licensees simply are not within the class of licensees (*i.e.*, wide-area SMRs) entitled to regulatory construction parity with EA licensees. For these reasons, the Commission should reject Chadmoore's attempt to once again seek reconsideration of Commission decisions regarding its own extended implementation authorization application and the rejustification decisions regarding its associates' licenses.

C. Mobile Relays' Proposal Falls Short of Regulatory Parity

Although Mobile Relays' Comments are somewhat unclear as to their support for regulatory parity among EA and wide-area SMRs, Mobile Relays appears to support some limited form of regulatory parity. The bottom line of Mobile Relays' Comments appears to be that some subset of wide-area licensees should be provided "parity" by requiring that they (a) construct at least two channels at every site, and (b) any site that is unconstructed, *i.e.*, has less than two channels in service, should be deleted from the licensee's wide-area authorization.^{17/} This proposal does not provide regulatory parity with EA licensees and certainly does not respond

^{17/} Comments of Mobile Relays at p. 5.

to the particular disparities highlighted by the *Fresno* Court. In *Fresno*, the Court concluded there was a disparity created by the fact that EA licensees might never have to construct in certain, under-populated portions of their service area while wide-area licensees, on the other hand, were required to construct stations at every licensed site without regard for consumer demand. Because Mobile Relays' proposal requires construction of every site at every authorized site, it does not provide regulatory parity among wide-area and EA licensees. Therefore, the Commission must reject Mobile Relays' proposal.

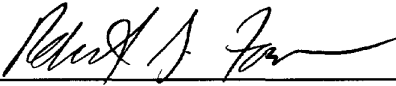
III. DISCUSSION

The Commission should reject Chadmoore's Comments as an untimely -- and repetitive -- request for reconsideration of a four-and-a-half-year-old Commission decision. Similarly, the Commission should reject Mobile Relays' Comments for failing to provide wide-area licensees regulatory parity with EA licensees. The majority of comments appropriately supported regulatory parity for wide-area licensees through the use of the same buildout requirements applicable to EA licensees. Because the EA buildout requirements can easily be extended to wide-area licensees and would provide regulatory among all wide-area and EA licensees, Nextel respectfully requests that the Commission apply to wide-area SMR licensees the same one-third in three years and two-thirds in

five years population coverage requirements applicable to EA licensees.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Rochelle L. Pearson, hereby certify that on this 29th day of July 1999,
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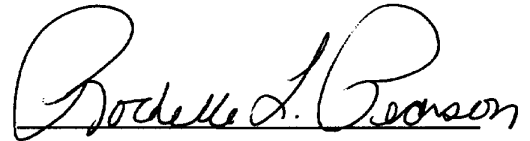
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